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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 THATIUS M.,

8 Plaintiff,

9 v.

10 ANDREW M. SAUL,
Commissioner of Social Security,

11 Defendant.
12

CASE NO. C19-5511-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

13 Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of
14 the Social Security Administration (Commissioner). The Commissioner denied plaintiff's
15 applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after
16 a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the
17 administrative record (AR), and all memoranda of record, this matter is REMANDED for further
18 proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1956¹ in Micronesia, later moving to the continental United
21 States. English is not his first language. (AR 42.) He previously worked as a cannery worker and
22 cannery supervisor. (AR 23.)
23

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 Plaintiff filed applications for DIB and SSI in 2016, alleging disability beginning with a
2 stroke on November 27, 2015. (AR 81, 88.) The applications were denied at the initial level and
3 on reconsideration. (AR 79, 80, 95, 96.)

4 On December 1, 2017, ALJ Malcolm Ross held a hearing, taking testimony from plaintiff,
5 his son, and a vocational expert (VE). (AR 31-78.) On May 23, 2018, the ALJ issued a decision
6 finding plaintiff not disabled from the onset date through the date of the decision. (AR 15-25.)

7 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
8 April 23, 2019 (AR 1-3), making the ALJ's decision the final decision of the Commissioner.
9 Plaintiff appealed this final decision of the Commissioner to this Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
15 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
16 engaged in substantial gainful activity since the alleged onset date. At step two, it must be
17 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff had the
18 severe impairments of status post cerebral vascular accident, diabetes mellitus, alcohol use
19 disorder, and eye abnormalities status post cataract surgery. Step three asks whether a claimant's
20 impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did
21 not meet or equal the criteria of a listed impairment.

22 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
23 residual functional capacity (RFC) and determine at step four whether the claimant has

1 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform
2 medium work, further limited to frequently balancing, stooping, kneeling, crouching, and
3 crawling; occasionally climbing ramps and stairs; and never climbing ladders, ropes, or scaffolds.
4 He can frequently use peripheral acuity and depth perception. He can tolerate occasional exposure
5 to extreme noise (above level three) and occasional exposure to excessive vibrations and hazards.
6 With that assessment, the ALJ found plaintiff able to perform his past relevant work as a cannery
7 worker or cannery supervisor, as generally performed (AR 23).

8 The ALJ also made alternative findings at step five. If a claimant demonstrates an inability
9 to perform past relevant work, or has no past relevant work, the burden shifts to the Commissioner
10 to demonstrate at step five that the claimant retains the capacity to make an adjustment to work
11 that exists in significant levels in the national economy. With the assistance of a VE, the ALJ
12 found plaintiff capable of performing other jobs, such as work as a laundry worker, janitor, or fish
13 cleaner (AR 24).

14 This Court's review of the ALJ's decision is limited to whether the decision is in
15 accordance with the law and the findings supported by substantial evidence in the record as a
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993); *accord Marsh v. Colvin*, 792 F.3d
17 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
18 by substantial evidence in the administrative record or is based on legal error.") Substantial
19 evidence means more than a scintilla, but less than a preponderance; it means such relevant
20 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
21 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation of the
22 evidence, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas*
23 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

1 Plaintiff argues the ALJ erred by rejecting his testimony and three medical opinions and
2 erred in evaluating his RFC. He requests remand for an award of benefits or, in the alternative,
3 for further administrative proceedings. The Commissioner argues the ALJ's decision has the
4 support of substantial evidence and should be affirmed.

5 Medical Opinions

6 The ALJ is responsible for assessing the medical evidence and resolving any conflicts or
7 ambiguities in the record. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th
8 Cir. 2014); *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008). When
9 evidence reasonably supports either confirming or reversing the ALJ's decision, the court may not
10 substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

11 In general, more weight should be given to the opinion of a treating doctor than to a non-
12 treating doctor, and more weight to the opinion of an examining doctor than to a non-examining
13 doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another
14 doctor, a treating or examining doctor's opinion may be rejected only for "clear and convincing"
15 reasons. *Id.* (quoted source omitted). Where contradicted, the opinion may not be rejected without
16 "specific and legitimate reasons' supported by substantial evidence in the record for so doing."
17 *Id.* at 830-31 (quoted source omitted). An ALJ may properly reject an opinion that is conclusory
18 and inconsistent with the record. *See generally Meanel v. Apfel*, 172 F.3d 1111, 1113-14 (9th Cir.
19 1999); *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986).

20 A. Oliver C. Kuhn-Wilken, D.O.

21 Plaintiff's eye doctor, Oliver Kuhn-Wilken, reported that plaintiff has "homonymous
22 hemianopsia of the right visual field," which severely limits plaintiff's peripheral vision in the
23 right half of his visual field. (AR 504, 521.) The condition limits plaintiff's "BCVA" (Best

1 Corrected Visual Acuity) and reading speed and cannot be corrected with surgery. (*Id.*) Plaintiff
2 is “not safe to drive.” (AR 498.)

3 The ALJ did not address Dr. Kuhn-Wilken’s statements. The Commissioner contends any
4 error is harmless because plaintiff has not shown his past work required driving or reading fast.
5 The Court finds otherwise.

6 The Commissioner concedes that the vocational testimony about the impact of a peripheral
7 acuity limitation on plaintiff’s past work was “confusing.” (Dkt. 16 at 3.) Nevertheless, the VE
8 testified clearly that plaintiff’s jobs required “frequent” use of peripheral vision and depth
9 perception. (AR 63-64.)² The VE also testified that the step five jobs found appropriate by the
10 ALJ – janitor, laundry worker, and fish cleaner – all require frequent or “very frequent” depth
11 perception and peripheral acuity. (AR 66-67.) It cannot be said the failure to address plaintiff’s
12 visual acuity limitations is harmless. On remand, the ALJ should consider Dr. Kuhn-Wilken’s
13 opinion about plaintiff’s visual limitations and reconsider the step four and five findings.

14 B. Don Prater, P.A.C.

15 Plaintiff’s treating provider, Mr. Prater, opined plaintiff could not work at either a
16 sedentary or active level “due to loss of balance, loss of hearing, loss of sight, decreased strength,
17 and hearing.” (AR 438.) The ALJ gave the opinion less weight because Mr. Prater was not an
18 acceptable medical source. (AR 22.) Plaintiff argues the report should be given the weight of a
19 treating physician because Dr. Werner reviewed and adopted the opinion. However, the mere fact
20 an opinion by an “other source” was co-signed by an acceptable medical source cannot transform
21

22 ² The VE contradicted himself later in his testimony, seeming to state only occasional depth
23 perception was required. (AR 72.) While adding to the confusion, this statement would also be inconsistent
with the Dictionary of Occupational Titles (DOT). *See* DOT 529.686-014, 1991 WL 674719 (G.P.O. 1991)
 (“Depth Perception: Frequently”).

1 it into a treating source opinion, absent evidence – which is wholly lacking here – that the other
2 source was acting as an agent of the physician. *Hutchens v. Astrue*, No. 10-35513, 433 F. App’x
3 510, 512 (9th Cir. May 10, 2011); *Bain v. Astrue*, No. 07-35635, 319 F. App’x. 543, 546 (9th Cir.
4 Mar. 12, 2009). Nevertheless, even as an opinion from an “other source,” Mr. Prater’s opinion
5 may only be discounted for specific and germane reasons. *Gomez v. Chater*, 74 F.3d 967, 970 (9th
6 Cir. 1996); *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

7 The Commissioner argues even if the ALJ erred by failing to consider Dr. Werner’s review
8 and adoption of Mr. Prater’s opinion, the error is harmless because the reasons the ALJ gave to
9 reject Mr. Prater’s opinion are sufficiently specific and legitimate to serve as reasons to discount
10 the opinion of a physician, Dr. Werner, as well. (Dkt. 16 at 7.) The Court disagrees.

11 The ALJ gave Mr. Prater’s opinion “very little weight” because it was inconsistent with
12 Mr. Prater’s own findings and the longitudinal treatment record. (AR 22, citing AR 444 and 483-
13 83.) The ALJ characterized Mr. Prater’s findings as demonstrating “all normal findings on physical
14 examination”, and “entirely within normal limits”. (*Id.*) The referenced records, however, do not
15 address balance, hearing, vision, or strength, and therefore fall short of contradicting Mr. Prater’s
16 opinion on those issues. On remand, the ALJ should reconsider Mr. Prater’s opinion and provide
17 legally sufficient reasons in support of the weight assigned to the opinion.

18 C. Vinay Malhotra, M.D.

19 Plaintiff’s treating cardiologist, Vinay Malhotra, opined that plaintiff “[b]y history is
20 functional class 2.” (AR 342.) The parties agree that this refers to Class II on the New York Heart
21 Association Classification scale and indicates a patient has slight limitations on physical activity.
22 (Dkt. 13 at 13; Dkt. 16 at 8.) The ALJ did not discuss this opinion. The Commissioner argues Dr.
23 Malhotra’s statement is not a medical opinion and, alternatively, any error is harmless because

1 slight limitations are not inconsistent with medium work. However, Dr. Malhotra referred to the
2 need for “aggressive secondary prevention.” (AR 342.) It is well established the ALJ must
3 consider the limiting effects of all of plaintiff’s impairments, including those that are not severe,
4 in determining RFC. 20 C.F.R. §§ 404.1545(e), 416.945(e); Social Security Ruling (SSR) 96-8p.
5 On remand, the ALJ should inquire of Dr. Malhotra whether “aggressive preventative measures”
6 include any environmental limitations on plaintiff’s work activities.

7 Plaintiff’s Symptom Testimony

8 Absent affirmative evidence of malingering, an ALJ must provide specific, clear, and
9 convincing reasons to reject a claimant’s subjective symptom testimony. *Burrell v. Colvin*, 775
10 F.3d 1133, 1136-37 (9th Cir. 2014). “General findings are insufficient; rather, the ALJ must
11 identify what testimony is not credible and what evidence undermines the claimant’s complaints.”
12 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). In considering the intensity, persistence, and
13 limiting effects of a claimant’s symptoms, the ALJ “examine[s] the entire case record, including
14 the objective medical evidence; an individual’s statements about the intensity, persistence, and
15 limiting effects of symptoms; statements and other information provided by medical sources and
16 other persons; and any other relevant evidence in the individual’s case record.” SSR 16-3p.³

17 The ALJ summarized plaintiff’s testimony as follows:

18 The claimant alleged that he could not sustain work activities on a regular and
19 continuing basis due to cerebrovascular accident, loss of strength and mobility, loss
20 of balance, blindness, hearing loss, diabetes, and hypertension. On a Function
21 Report he provided with this application and appeal, the claimant noted his
impairments affect his ability to perform basic activities such as lifting, squatting,
bending, standing, reaching, walking, sitting, kneeling, talking, hearing, stair
climbing, seeing, memory, completing tasks, concentration, understanding,

22 ³ Effective March 28, 2016, the Social Security Administration (SSA) eliminated the term
23 “credibility” from its policy and clarified the evaluation of a claimant’s subjective symptoms is not an
examination of character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term
credibility.

1 following instructions, and using his hands. He explained that since his stroke, his
2 thinking is delayed, he is forgetful and has to ask the time and date constantly, he
3 gets dizzy when standing or walking, his eyesight is cloudy, and he has weakness
4 from inactivity. He stated that he could walk a few blocks before he would have to
5 stop and rest for about 15 minutes, and he has difficulty following instructions. The
claimant testified at the hearing, but was unable to provide much information about
his specific symptoms and limitations, due to reported poor memory since his
stroke. He did note that he has had to use a cane for balance, though it has not been
prescribed by a doctor, and he has to hold onto something while walking.

6 (AR 20 (citations omitted).) The ALJ discounted plaintiff's testimony because it was unsupported
7 by medical evidence and because plaintiff made inconsistent statements about his education,
8 ability to drive, and alcohol use. (AR 20-21.) Symptom "testimony cannot be rejected on the sole
9 ground that it is not fully corroborated by objective medical evidence[.]" *Rollins v. Massanari*,
10 261 F.3d 853, 857 (9th Cir. 2001). Therefore, to determine the sufficiency of the ALJ's
11 consideration of plaintiff's testimony, it is necessary to review the substantial evidence support for
12 the ALJ's reliance on the inconsistency of plaintiff's statements about his activities.

13 The Court finds problematic the ALJ's evaluation of plaintiff's subjective testimony. The
14 ALJ relied on a psychological evaluation by Brett Valette, Ph.D, wherein Dr. Valette stated that
15 plaintiff's "organization and character of speech was difficult to understand" and he "has a strong
16 accent." (AR 541.) Dr. Valette documented the following exchange regarding alcohol use: "I
17 quit smoking and drinking alcohol after my stroke.' You told me you never drank alcohol. 'A lot.'
18 ... Why did you tell me you did not drink alcohol? 'I quit.'" (AR 541.) Dr. Valette documented
19 the following exchange regarding driving: "I have not driven since my stroke.' You told me you
20 drove here? 'Well...I do drive...But I don't drive a lot.'" (AR 540.) Despite Dr. Valette's
21 acknowledged difficulty understanding plaintiff, the ALJ relied on the confusing exchanges
22 between Dr. Valette and plaintiff to conclude plaintiff made "inconsistent statements that tend to
23 undermine the reliability of his allegations." (AR 21.) Furthermore, the ALJ does not specify

1 which particular statements by plaintiff about his symptoms and limitations are being disregarded
2 or given less weight. On remand, the ALJ should provide clarification as to the evaluation of
3 plaintiff's symptom testimony.

4 Step Four and Five Findings

5 The ALJ's reconsideration of the evidence as discussed herein may implicate the ALJ's
6 findings regarding plaintiff's functional capacity. On remand, the ALJ should reconsider the
7 sequential analysis at steps four and five.

8 Scope of Remand

9 Remand for an award of benefits "is a rare and prophylactic exception to the well-
10 established ordinary remand rule." *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir. 2017). The
11 Ninth Circuit has established a three-step framework for deciding whether a case may be remanded
12 for an award of benefits. *Id.* at 1045. First, the Court must determine whether the ALJ has failed
13 to provide legally sufficient reasons for rejecting evidence. *Id.* (citing *Garrison v. Colvin*, 759
14 F.3d 995, 1020 (9th Cir. 2014)). Second, the Court must determine "whether the record has been
15 fully developed, whether there are outstanding issues that must be resolved before a determination
16 of disability can be made, and whether further administrative proceedings would be useful."
17 *Treichler*, 775 F.3d at 1101 (internal citations and quotation marks omitted). If the first two steps
18 are satisfied, the Court must determine whether, "if the improperly discredited evidence were
19 credited as true, the ALJ would be required to find the claimant disabled on remand." *Garrison*,
20 759 F.3d at 1020. "Even if [the Court] reach[es] the third step and credits [the improperly
21 discredited evidence] as true, it is within the court's discretion either to make a direct award of
22 benefits or to remand for further proceedings." *Leon*, 880 F.3d at 1045 (citing *Treichler*, 773 F.3d
23 at 1101). Because evidentiary issues must be addressed by the ALJ as described herein, remand

1 for further proceedings is appropriate.

2 **CONCLUSION**

3 For the reasons set forth above, this matter is REMANDED for further administrative
4 proceedings.

5 DATED this 7th day of February, 2020.

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7 Mary Alice Theiler
8 United States Magistrate Judge
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